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Nos. 94-1893, 94-1900

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *et al.*
and
NATIONAL CABLE TELEVISION ASSOCIATION, *et al.*,
Petitioners,
v.
BELL ATLANTIC CORPORATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The California Cable Television Association ("CCTA") submits this brief as *amicus curiae* in support of petitioners.[1]

CCTA is a trade association representing cable television system operators that provide cable television service to nearly six million California residents, as well

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[1] Consistent with S. Ct. R. 37.3, all parties have given CCTA their consent to the filing of this brief. Two members of CCTA, Time Warner Cable and Home Box Office, are not represented by CCTA for purposes of this action.

as cable television programmers and equipment suppliers. CCTA brings information to the Court concerning the effect elimination of the in-region ban on telephone company provision of video programming has had, and will continue to have, on cable television operators and consumers in California. CCTA has unique knowledge of the incentive and ability of local exchange carriers ("LECs") in California—specifically, Pacific Bell ("Pacific") and GTE Corporation—to engage in anticompetitive behavior in a manner that directly affects the ability of cable operators to compete effectively in the marketplace. Notably, this anticompetitive conduct is at the heart of the congressional justification for Section 533(b) of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 47 U.S.C. § 533(b) ("telephone-cable cross-ownership ban" or "cross-ownership ban").

Since 1958, CCTA has participated in proceedings before administrative, legislative, and judicial bodies on behalf of the cable television industry in California and its individual members. CCTA has a wide range of experience advocating the rights of cable television operators before this Court[2] and before the United States Court of Appeals for the Ninth Circuit.[3] Most recent and relevant to the questions posed by the petitioners, CCTA filed a brief as intervenor-applicant in the United States Court of Appeals for the Ninth Circuit when the district

[2] See *amicus* briefs filed by CCTA in *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994) and *Leathers v. Medlock*, 499 U.S. 439 (1991).

[3] CCTA has filed *amicus* briefs in *Preferred Communications, Inc. v. City of Los Angeles, California, and Department of Water and Power*, 754 F.2d 1396 (9th Cir. 1985), aff'd, 476 U.S. 488 (1986); and *Preferred Communications, Inc. v. City of Los Angeles, California, and Department of Water and Power*, 13 F.3d 1327 (9th Cir.), cert. denied, 114 S. Ct. 2738 (1994).

court invalidated the telephone company-cable operator cross-ownership ban at issue in this case.[4]

This *amicus* brief will illustrate that resolution of the issues raised by petitioners before this Court will have a substantial impact on competition in the provision of multichannel video programming, the video services market, and the market for local telephone competition as well.

SUMMARY OF ARGUMENT

The telephone-cable cross-ownership ban is an economic regulation that was enacted by Congress for the purpose of preserving and increasing competition in the video services business. There is no doubt that the provision serves this important governmental purpose. CCTA has observed telephone companies in California for more than three decades and has documented numerous cases of illegal cross-subsidization and discriminatory acts. The incentive and ability to engage in these types of anticompetitive behavior is increasing as telephone companies enter the video business and as competitors to their telephone monopolies are just beginning to appear on the distant horizon. Congress could reasonably have determined that a ban on telephone company provison of video programming within their telephone service area is the only effective means to protect the cable industry from these abuses.

At the same time, the cross-ownership ban does not implicate the First Amendment rights of telephone companies in any meaningful way. The courts below cor-

[4] See Brief of CCTA in *U S West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1995), petition for reh'g pending. The court of appeals ultimately denied CCTA intervenor status in that case and, thus, CCTA participated as *amicus curiae*. CCTA, however, participated in joint oral argument of the *U S West* case in its capacity as an intervenor in *Pacific Telesis Group v. United States*, 48 F.3d 1106 (9th Cir. 1994), petition for reh'g pending, which also involved a constitutional challenge to Section 533(b). In addition, CCTA was a party in *GTE California, Inc. v. FCC*, 39 F.3d 940 (9th Cir. 1994).

rectly determined that the prohibition on providing video programming directly to subscribers within their service areas leaves open ample alternative opportunities for communication. While there may be some room for debate regarding to the appropriateness of Section 533(b) as a policy matter, the dispute does not rise to a constitutional level. This Court should leave intact the long-standing congressional determination on this purely economic issue and permit the policy questions involved to be resolved by Congress.

ARGUMENT

This case is about whether Congress has the authority to enact a non-content based regulation as a means to increase media outlet diversity and deter anticompetitive behavior if such regulation has an incidental (and minor) effect on the speech rights of telephone companies. CCTA submits that, given the wide array of alternative avenues for communication available to telephone companies and the fact that the regulation serves an important governmental purpose, Congress' decision to restrict telephone company-cable television cross-ownership is entirely consistent with the First Amendment.

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." [5] At most, Section 533(b) operates as a time, place and manner regulation: it merely limits the manner (no provision of video programming directly to subscribers) in which a telephone company may speak in certain places (its local telephone service areas). Under the standards applicable to such circumstances,[6] Section 533(b) is constitutional.

[5] *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

[6] See *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968).

Congress had good reason to restrict local telephone companies from providing cable television service in their telephone service areas when it enacted Section 533(b) in 1984, and those justifications are equally relevant and constitutionally valid today. The concerns that lay at the heart of Congress' action involved the telephone companies' ability to thwart competition by shifting costs from the competitive video business to their captive telephone ratepayers. Congress also recognized that cable operators' reliance on access to telephone poles and conduits to distribute their signals raised significant discrimination issues.

In California, the local telephone business is a monopoly with almost $11 billion in annual revenues.[7] By comparison, CCTA's cable operator members have approximately $3 billion in annual revenues in California spread among eight large and several dozen small companies with local franchises that are non-exclusive. Section 533(b) ensures the continued viability of the cable television industry given the current level of telephone company cross-subsidy and discriminatory acts.

I. SECTION 533(b) IS A REASONABLE CROSS-OWNERSHIP PROVISION THAT SERVES A SIGNIFICANT GOVERNMENTAL PURPOSE

A. By prohibiting telephone companies from providing video programming that they own and control to customers within their telephone service areas, Section 533(b) does not take a unique regulatory approach in the communications area. Rather, it is but one of a series of provisions that place limits on who can participate in various segments of the industry.

For example, Section 533(a)(1) restricts broadcast television stations from owning cable television systems within their signal areas. Similarly, Section 533(a)(2)

[7] See Federal-State Joint Board Staff, Comprehensive Monitoring Report on Telephone Service, CC Docket No. 87-339, at 447 (May 1995).

prevents cable operators from holding licenses for "wireless" cable systems or operating satellite master antenna systems within their cable service areas.

Federal Communications Commission ("FCC") regulations also prohibit common ownership of cable facilities and broadcast television networks, 47 C.F.R. § 76.501 (b)(1) (1994), daily newspapers and broadcast stations in the same community, *id.* at § 73.3555(d), and a common interest in two television stations with overlapping service areas or in a radio and television station in the same market, *id.* at § 73.3555(c).

B. The statutory provisions and regulations were designed to increase media outlet diversity and prevent anticompetitive behavior. The cable television-telephone company prohibition, for example, was first adopted by the FCC in 1970 to address the problem of discrimination against cable companies unaffiliated with LECs and to avoid the extension of the telephone company monopoly into the cable services market.[8] The FCC concluded that "the preservation of . . . competition will best be assured by the exclusion of telephone companies in their service areas from engaging in the sale of [cable] service to the viewing public." [9]

Following a decade of experience with the telephone-cable cross-ownership provision, in 1980, the FCC directed its staff to conduct a study of the Commission's cable cross-ownership policies. This directive culminated in the issuance of a 200-page report by the FCC Office of Plans and Policy in November 1981, shortly before

[8] See 47 C.F.R. § 63.54 (1994) (originally codified at 47 C.F.R. § 64.601 (1971)); *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307 (1970), aff'd *sub nom. General Tel. Co. of Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

[9] 21 F.C.C.2d at 325.

Congress began considering legislation that would evolve into the 1984 Cable Act.[10]

After considering in detail a number of alternative regulatory policies, the *1981 OPP Report* concluded that continued prohibition of telephone-cable cross-ownership "remains essential." [11] Among the other things, the report explained that entry into the local cable television business may "allow a telephone company partially to avoid rate-of-return regulation on its telephone service" by "attributing costs to the regulated telephone division and revenues to an unregulated cable division." [12]

But perhaps more importantly, the report went beyond the original justifications for the rule and concluded that the cross-ownership restriction should not be lifted until the potential of cable television operators to become genuine competitors of telephone companies with respect to local *telephone* services became more clear. The report noted that "cable has more potential to provide telephone-like services in the near future than does any other carrier." [13] Independent cable operators thus offered the potential "to constrain telephone company market power" and "long run prospects for eliminating the 'local bottleneck' altogether." *Id.* at 160. Thus, the Commission ex-

[10] FCC Office of Plans and Policy, *FCC Policy on Cable Ownership: A Staff Report* (Nov. 1981) (*"1981 OPP Report"*).

[11] *Id.* at 177. See also *id.* at 143 (restriction "must be retained for the time being.").

[12] *Id.* at 153. See *California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990) (explaining in a related context that "[s]uch improper cost-shifting effectively subsidizes a carrier's unregulated activities with monopoly profits from its regulated activities, to the detriment of both its monopoly ratepayers and its competitors in the [unregulated] market.").

[13] *1981 OPP Report* at 159. See also *id.* at 176 ("Indeed, cable now shows greater promise for becoming a competitor in many two-way services than ever before. Therefore, the ban should be continued.").

plained, the decision of whether to lift the cross-ownership ban:

> *depends critically on the nature of competition in the provision of local loop services.* Cable facilities are currently one of a very few ways that the telephone company owned local loop can be circumvented. As such, unregulated cable ownership provides an important opportunity for continuing telephone company control over local distribution.

Id. at 177 (emphasis supplied).

C. Against this backdrop, Congress essentially codified the FCC's cross-ownership rules in Section 533(b) of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 47 U.S.C. § 533(b). It indicated that the ban was intended "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets." [14]

In recent years, Congress has studied and reassessed the policies underlying the telephone-cable cross-ownership ban on a nearly continuous basis and has chosen to retain the provision. In 1990, after the FCC had tentatively recommended repeal of the Section 533(b),[15] the Senate Commerce Committee issued a report stating that "[t]he Committee examined carefully the arguments of proponents and opponents of repeal of the cable/telco cross-ownership statute, and concluded that the Committee *could not* at the present time support repeal." [16] Moreover, in passing comprehensive cable television legislation in 1992, Congress reaffirmed its support of the telephone-cable cross-ownership provision and enacted

[14] H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984).

[15] *In re Telephone Company—Cable Television Cross-Ownership Rules (Further Notice of Inquiry and Notice of Proposed Rulemaking)*, 3 FCC Rcd. 5849 (1988).

[16] S. Rep. No. 456, 101st Cong., 2d Sess. 8 (1990) (emphasis supplied).

additional cross-ownership rules governing the cable industry (also codified at 47 U.S.C. § 533).[17]

As the foregoing demonstrates, Congress reasonably concluded that enacting Section 533(b) would prevent telephone companies from improperly leveraging their state-sanctioned local telephone monopolies into an important adjacent market. More significantly, each time Congress had the opportunity after enactment of the telephone-cable cross-ownership ban to reconsider the provision, it chose to maintain the status quo. Even the court of appeals found that the restriction does indeed serve the significant governmental interest in media outlet diversity and deterrence of anticompetitive behavior.[18] This Court should uphold the long-standing congressional consensus on this issue.[19]

II. SECTION 533(b) IS NARROWLY TAILORED TO SERVE ITS OBJECTIVE OF PREVENTING MONOPOLY LEVERAGING AND PROMOTING FACILITIES-BASED COMPETITION

A. Under the *O'Brien-Ward* test, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " [20] While the government may not regulate speech in such a manner that "a substantial portion of the burden on speech does not serve to advance its goals," the validity

[17] See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); S. Rep. No. 92, 102d Cong., 2d Sess. 46-47 (1991) (accompanying the 1992 Cable Act), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1179-80 ("1991 Senate Report").

[18] Pet. App. 34a.

[19] See *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 467, 472 (1994).

[20] *Ward*, 491 U.S. at 800, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985); *Turner*, 114 S. Ct. at 2469.

of a content-neutral regulation " 'does not turn on a judge's agreement with the responsible decisionmaker[s] concerning the most appropriate method for promoting significant governmental interests' or the degree to which those interests should be promoted." [21] Rather, the *O'Brien* "tailoring" requirement is satisfied if the restriction on speech is "not broader than *Congress* reasonably could have determined to be necessary." [22]

In view of these governing standards, no basis exists in this case for casting aside the means Congress has selected to serve its unquestionably legitimate ends. *First*, on its face the statute is tailored *precisely* to its goal of preventing telephone companies from entering the cable television business by means of unfairly leveraging their local telephone monopolies. It does not apply where a telephone company possesses no such monopoly. The scope of the "burden on speech" corresponds directly to the evils Congress has sought to address.

Second, Congress could reasonably conclude that non-structural regulatory "safeguards" would be inadequate—or, certainly, less effective—in furthering its economic objectives, and that a structural solution best serves its overall goals. As the General Accounting Office has cautioned, there is "considerable room for debate over what safeguards would be effective and/or adequate." [23]

[21] *Ward*, 491 U.S. at 800, quoting *Albertini*, 472 U.S. at 689. See also *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993).

[22] *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 539 (1987) (emphasis supplied).

[23] GAO, *Telephone Communications: Controlling Cross-Subsidy Between Regulated and Competitive Service* 11 (1987). See B. Owen & S. Wildman, *Video Economics* 256 (Harvard Univ. Press 1992) (noting that while "there are short-run advantages for the public" that would result from local telephone company entry in the cable business, competition between telephone and cable companies is "likely to be short lived, ending in a monopoly by the telephone company, whether or not economically justified.").

The FCC itself has recognized that "telephone companies continue to have the ability to deny potential competitors access [and] to engage in anticompetitive cross subsidies." [24]

Nonetheless, in tentatively concluding that "the costs of the cross-ownership ban exceed the benefits," the FCC stated that "safeguards perhaps analogous to those devised in *Computer III*" could be devised to address concerns regarding cross-subsidization and related anticompetitive conduct.[25] Subsequently, the Commission's rules in *Computer III*—particularly their reliance on non-structual safeguards to prevent monopoly leveraging—were set aside as "arbitrary and capricious." [26] If the court of appeals could reach this conclusion despite the ordinary deference granted to administrative agencies, certainly Congress—which owes no such deference—reasonably could as well with respect to these types of issues.[27] In addition, Congress could reasonably conclude

[24] *In re Telephone Company—Cable Television Cross-Ownership Rules (Further Notice of Inquiry and Notice of Proposed Rulemaking)*, 3 FCC Rcd. at 5860.

[25] *Id.* at 5856, 5860. *"Computer III"* refers to a proceeding in which the FCC issued rules governing the provision by the Bell Operating Companies of so-called "enhanced" or data processing services over their networks. See *California v. FCC*, 905 F.2d at 1223 & n.1-3.

[26] *California v. FCC*, 905 F.2d at 1238 ("the record yields no support for the Commission's position that market and technological changes . . . have reduced the danger of cross-subsidization by the [telephone companies].").

[27] As aptly stated by Commissioner Marshall, who joined the FCC's 1992 recommendation for repeal of Section 533(b), the Commission's position rests on certain "critical articles of faith," one being "that our cost accounting and open network architecture requirements will adequately police against cross-subsidization." *Telephone Company—Cable Television Cross-Ownership Rule, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 5781, 5881 (1992) (separate statement of Commissioner

that *other* advantages that flow from the historic and ongoing control of the local telephone monopoly—such as a guaranteed rate base and access to subscribers—justify restricting local telephone company entry into the cable television business as a matter of fair competition.

B. Nevertheless, the court of appeals found that the restriction is not narrowly tailored enough to pass constitutional muster because there exist less burdensome alternatives. The only alternative suggested by the court, however, is adoption of rules limiting "the telephone companies' editorial control over video programming to a fixed percentage of the channels' available." [28] The court did not explain how this alternative could adequately serve the government's objectives.

It could not. The key factual predicate that prompted promulgation of the ownership ban in the first instance still exists today. LECs continue to enjoy overwhelming dominance of the local telephone access market.[29] Nation-

Marshall), modified in part on reconsideration, 10 FCC Rcd. 244 (1994).

[28] Pet. App. 41a.

[29] Until last month in California, local exchange carriers retained a *de jure* monopoly. See *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers*, CAL. PUB. UTIL. Decision No. 89-10-031. Under interim rules adopted by the California Public Utilities Commission ("CPUC") on July 25, 1995, new entrants will now be able to apply to compete in the local telephone market. The CPUC may approve such applications to permit local exchange facilities-based competition to begin on January 1, 1996 and resale-based competition to begin on March 1, 1996. See *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, CAL. PUB. UTIL. Decision No. 95-07-054 (1995). The CPUC continues to work on significant aspects of the rules so that they can be implemented effectively in that time period. *Id.* Recent experience, however, demonstrates that California telephone companies, which have discriminated against toll call competitive entrants, would use all possible means to protect their *de facto* monopoly. See n.38, *infra*.

wide, industry analysts reported last year that aggregate revenues for access services of all competitive local telephone access providers combined are less than one percent of total monopoly LEC access revenues and an even smaller percentage of total revenues.[30] In 1994, the Pacific Telesis Group experienced a 2.9 percent increase in the number of customer access lines and a 7.7 percent jump in related minutes-of-use on its network.[31]

C. *Cross-Subsidy.* CCTA has had first-hand experience with telephone company attempts to exploit their extraordinary market power to gain a competitive advantage in the video services market. For example, in 1986, Pacific constructed a "leaseback" video transport cable system for an independent cable operator in Palo Alto, California, and estimated that the system's annual revenue for the first 15 years would recover its costs and yield a rate of return on Pacific's investment of between 10 and 12.72 percent.[32] Although Pacific's construction costs, in fact, had vastly exceeded its estimate, the company never increased its tariffed rates to the customer.[33] As a result, consumers and potential competitors were injured when Pacific required telephone ratepayers to bear the burden of its loss. Significantly, this conduct, which violated Pacific's tariff and the FCC's cross-ownership rules, was not prevented by the accounting "safeguards" imposed by the FCC.

[30] Economics and Technology, Inc./Hatfield Associates, Inc., "The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers," at ii (February, 1994).

[31] Pacific Telesis Group, 1994 Summary Annual Report 2 (1995).

[32] Application of the Pacific Bell for Authority Pursuant to Section 214 of the Communications Act of 1934, and Section 63.01 of the Commission's Rules and Regulations to Construct and Maintain Broadband Cable Distribution Facilities in and around the City of Palo Alto, CA, File No. W-P-C 5753 (filed April, 1986 and amended September, 1986).

[33] See Reply of the California Cable Television Association to Pacific Bell's Opposition to Petitions to Deny, FCC File Nos. W-P-C 6913, 6914, 6915 and 6916, at 39-42 (filed March 11, 1994).

In June 1994, the National Association of Regulatory Utility Commissioners ("NARUC") confirmed, after performing a comprehensive audit, that Pacific has engaged in persistent cross-subsidization since 1990.[34] The NARUC audit team found that Pacific had failed to report and track many costs associated with research and development for its new broadband services, which are required to support high quality entertainment television.[35] More significantly, NARUC observed that the company had spent hundreds of millions of dollars on fiber-based applications that are competitively motivated without an evaluation of ratepayer benefits from their investments, which were charged to monoply services.[36] The results of this audit demonstrate that neither the state's "price-caps" regulation nor its cost allocation rules can prevent Pacific from proceeding with its investment plans secure in the belief that monoply ratepayers will pay for its unregulated network modifications.

D. *Discrimination.* One of the main purposes for enactment of the telephone-cable cross-ownership ban was to prevent telephone companies from using their ownership of poles to discriminate against cable television companies. Despite this safeguard, LECs continue to engage in anticompetitive behavior relative to pole attachment. Last month the CPUC warned Pacific to cease moving television cables into areas violating agency clearance rules in order to make room for its own broadband circuit system, which will transmit Pacific's video service.[37]

Moreover, as competition for telephony service begins to open, the telephone companies continue to use their

[34] National Ass'n of Regulatory Utility Commissioners, *An Audit of the Affiliate Interests of the Pacific Telesis Group*, July 1994.

[35] *Id.* at B-49.

[36] *Id.* at B-50.

[37] See, *e.g.*, Letter from Harry Strahl, Acting Chief, Utilities Safety Branch, California Public Utilities Commission, to Mary Vanderpan, Regulatory Vice President, Pacific Bell, File No. G.O. 95/3069, dated July 10, 1995.

bottleneck to disadvantage new competitors. The CPUC recently concluded that Pacific is in violation of its own intrastate tariffs for refusing to route the toll calls of certain customers to competing carriers.[38] The CPUC issued a preliminary injunction against Pacific, finding that the complainant was likely to prevail on the merits of its claim that "Pacific is using its market power in the local exchange market to maintain a monopoly in the market for intraLATA toll service." [39]

LECs have engaged in similar tactics in an effort to circumvent the FCC's attempts to increase competition in the local telephone markets. After months of litigation and stalling on the part of the telephone companies, the FCC concluded in May 1995 that a number of LECs had offered virtual collocation rates to competitive access providers that were unlawfully high.[40] While the FCC prescribed significantly lower maximum rates, the telephone companies' action had the effect of delaying the commencement of local access competition.

E. It is far from clear whether the FCC has the practical ability to police LEC anticompetitive behavior in the form of cross-subsidy and discrimination. For example, the agency recently granted Pacific's applications to construct and operate "common carrier" video dialtone systems in California, despite the telephone company's proposal to charge 78 percent of the costs associated with constructing its new integrated hybrid fiber-coaxial system to its telephone ratepayers.[41] While

[38] *MCI Telecommunications Corp. v. Pacific Bell*, No. 95-05-020, 1995 Cal. PUC LEXIS 458 (May 10, 1995).

[39] *Id.* at *59.

[40] *In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, CC Docket No. 94-97, Phase I (released May 11, 1995).

[41] See *In the Matter of the Applications of Pacific Bell for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain advanced*

the FCC recognized that Pacific's applications formed part of the company's overall plans to deploy an advanced broadband network that will provide both telephone and video services over the same transmission path to a projected five million homes by the end of the decade,[42] it has not yet resolved fundamental questions regarding cost allocation between the regulated and unregulated aspects of the network.

The serious threat of cross-subsidization represented by this void in agency regulation prompted FCC Commissioner Andrew Barrett to urge the FCC to resolve in the near term the "very important and yet unanswered cost allocation issues" associated with video dialtone service.[43] Commissioner Barrett stated that the FCC's practice of waiting until the tariff review process to make such decisions has, in at least one case, allowed rates to remain in effect, "which have the potential of being predatorily low." [44]

This overwhelming evidence demonstrates that the cross-ownership ban was enacted and retained by Congress for

fiber optic facilities and equipment to provide video dialtone service to selected communities in Orange County, the Southern San Francisco Bay Area, the Los Angeles area, and the San Diego area in California, FCC 95-302, File Nos. W-P-C 6913, 6914, 6915, 6916, Order and Authorization (released Aug. 15, 1995) ("*Pacific Authorization*"); see also Letter from Jeffrey Sinsheimer, Director of Regulatory Affairs, CCTA, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, FCC, Exhibit 1 at 2 (Declaration of Leland L. Johnson, Ph.D.), dated April 11, 1995.

[42] *Pacific Authorization*, at ¶ 7. The FCC also "overlooked" Pacific's proposal to grant discriminatory access to a "favored" video programmer and to purchase such programmer if this Court lifts the cross-ownership ban. See Letter from Spencer Kaitz, President, CCTA, to Reed Hundt, Chairman, FCC, FCC File Nos. W-P-C 6913, 6914, 6915, 6916, dated September 19, 1994.

[43] *Pacific Authorization*, Concurring Statement of Commissioner Andrew C. Barrett.

[44] *Id.*

a very important reason. It is the only measure that has the ability to prevent LECs from extending their telephone monopolies into the video services market. There are no less burdensome alternatives that would be sufficiently effective.

F. Equally important, there is simply no evidence that this statutory provision has any effect whatsoever on the ability of LECs to get their desired messages to local subscribers. As the district court in the case below recognized, "the statute leaves open ample alternative channels for communication." The court explained:

> Plaintiffs may provide video programming to audiences outside their service area, and may speak through any type of non-video medium to audiences inside their service area. Even more significantly, however, plaintiffs may also reach audiences within their service area with video programming. Section 533(b) only prohibits plaintiffs from *directly* providing video programming to their subscribers. Plaintiffs are not prohibited from producing their own video programming and marketing it to broadcasters or cable operators for transmission by means other than plaintiffs' own facilities. Public access requirements [see 47 U.S.C. § 532] ensure that such programming cannot be silenced by the entities responsible for the direct provision of the video programming.[45]

Section 533(b) does not "ban" *any* speech, the court found, but operates "only as a restriction on the 'manner' in which plaintiffs may speak." Thus, this very narrow economic regulation does not implicate the First Amendment in any meaningful way.

[45] Pet. App. 71a.

CONCLUSION

For the foregoing reasons, the Court should find that Section 533(b) is consistent with the First Amendment and reverse the court of appeals.[46]

Respectfully submitted,

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[46] In the alternative to this Court's review, CCTA supports petitioners' request that the decision of the court of appeals be vacated and remanded for further consideration in light of the FCC's action in *Telephone Company—Cable Television Cross-Ownership Rule, Sections 63.54-63.58, Third Report and Order*, FCC 95-203 (released May 16, 1995).